OH ENG THYE v. PUBLIC PROSECUTOR.

[A. Cr. J. (Bellamy, J.) October 6, 1953]

[Malacca — Criminal Appeal No. 11 of 1953]

Customs Enactment ss. 114 and 119 — Abetment of possession of uncustomed goods — Proof of knowledge.

This was an appeal against the conviction of the appellant on a charge of abetment of possession of uncustomed goods. The principal ground of appeal was that there was no evidence that the appellant knew that the goods were uncustomed.

Held: (1) as there was no evidence of knowledge of the appellant that the goods were uncustomed, the appellant was wrongly convicted under section 119 of the Customs Enactment; (2) there was no evidence before the learned President which would justify the charge being amended to one under section 114(i)(c) of the Customs Enactment.

Cases referred to :—

(1) *Kee Kim Chooi & Ors. v. Public Prosecutor* (1952) M.L.J. 180.

(2) *Mersey Docks and Harbour Board v. Procter* (1923) A.C. 253.

(3) *Toh Ah Loh and Mak Thim v. Rex* (1949) M.L.J. 54.

CRIMINAL APPEAL.

C. S. Jayaswal for the appellant.

L. A. Massie (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Bellamy, J. : — The appellant was charged before the President of the Sessions Court at Malacca on the following charge :—

"That you, Oh Eng Thye, did abet the possession by one Marhom bin Oderi at No. 123, Kampong Bukit China, Malacca on 28.4.53 at about 9.15 a.m. of uncustomed goods, to wit: 120 dozen Pond's Lipsticks, 1,000 pieces hair nets, 72 dozen Blue Hyacinth Rouge, 40 dozen Extrait Santhalia, 288 packs of playing cards "Caravan No. 491", and that you have thereby committed an offence under section 119 of Enactment 5/36, and punishable under section 114 of the same Enactment."

One Marhom bin Oderi was charged jointly with him with the substantive offence of being in possession of the said uncustomed goods at the time and place alleged. They were convicted by the learned President and each was sentenced to pay a fine of $5,000, in default, to suffer imprisonment for six months. The appellant now appeals against his conviction and sentence.

On the question of sentence, the petition of appeal of the appellant does not contain any particulars of the points of law in regard to which it is alleged that the learned President erred in imposing a fine of $5,000 or in imposing imprisonment for six months in default of payment of the fine, and no argument was addressed to me on this point. If the conviction is right, I see no reason for interfering with the sentence in this case.

The main ground of appeal was that the learned President erred in law in finding the charge proved against the appellant because, firstly, there was no evidence that the appellant knew that the goods were uncustomed in the sense charged, that is to say, that he knew that the goods had been imported and that duty had not been paid upon them; and, secondly, there was no evidence of any conspiracy between the appellant and Marhom bin Oderi without which the offence of abetment could not be held to have been committed. Counsel for the appellant relied strongly upon the decision in the case of *Kee Kim Chooi & Ors. v. Public Prosecutor*[1] where Thompson, J. observed at pages 182 and 183 :—

"Abetment of an offence, however, is a distinct offence from the offence itself (see **Sesha Ayyar v. Venkatasubba Chetty** (1924) A.I.R. Mad. 487). Abetment of a Penal Code offence is a distinct offence punishable under section 109 of the Code and similarly abetment of a customs offence is a distinct offence punishable under section 119 of the Customs Enactment. It follows, therefore, that in attempting to make out an abetment of a Customs offence the prosecution are not in a position to make use of sub-section (ii) of section 114 for in terms that sub-section only applies to prosecutions under the first sub-section of the same section. So it follows in the case of abetment that so far as knowledge is concerned the prosecution can only make use of the ordinary mechanism of proof, that is to say, the production of satisfactory evidence, and if the matter went no further in the present case I would be compelled to say that at the conclusion of the prosecution case no case against the accused had been made out which if unrebutted would warrant his conviction and the accused was therefore entitled to be acquitted by reason of section 173(f) of the Criminal Procedure Code."

In face of the judgment in the case of *Kee Kim Chooi & Ors. v. Public Prosecutor*[1] which was binding upon the lower Court, and the correctness of which had not been questioned before me, the learned Deputy Public Prosecutor, very rightly in my view, conceded that he could not support the conviction of the appellant on the charge of abetment of the substantive offence. In his reply, he stated that he agreed with the submission of Mr. Jayaswal that there was no evidence of knowledge in the appellant as would satisfy the provisions of section 108 of the Penal Code, and that as the prosecution was unable to pray in aid the presumption as to knowledge under sub-section (ii) of section 114 of the Customs Enactment, 1936, the learned President erred in convicting the appellant on the charge of abetment under section 119 of the said Enactment.

I agree. There is, I may add, nothing in the grounds of decision of the learned President to suggest that he gave any consideration to the question of the onus of proof of knowledge of the appellant that the goods were uncustomed being on the prosecution in a charge

under section 119 of the said Enactment, and I can only assume that he overlooked it. That being the case the conviction for the abetment of the substantive offence must be set aside.

But the learned Deputy submitted that there was ample material before the lower Court upon which the learned President could have found at the close of the case for the prosecution that the appellant and Marhom bin Oderi were in possession jointly of the uncustomed goods, the subject-matter of the charge, and that the learned President should have amended the charge against the appellant to one under section 114(i)(e) of the said Enactment. He stressed that had the learned President taken this course as he is enjoined to do under the provisions of section 182(h) of the Criminal Procedure Code, the onus of disproving knowledge would have been on the appellant by reason of section 114(ii) of the said Enactment, and that as the learned President had omitted to consider this aspect of the case there should be an order of retrial on a charge framed under section 114(i)(e) of the said Enactment.

No question arises in this appeal that the goods seized were not in fact uncustomed goods or that they were not found in the possession of Marhom bin Oderi. I find myself, therefore, able to agree to the argument of the learned Deputy, provided, of course, that there was evidence before the learned trial President that the goods were also in the possession of the appellant or evidence of facts from which he could infer such possession.

Turning to the grounds of decision of the learned President, I can find no express finding of fact that the appellant was in possession of the uncustomed goods. The only passage in his grounds of decision which has any bearing on the question of possession reads as follows :—

"The evidence was that a special constable, Othman bin Rasip, No. 10972, had seen both Nos. 1 and 2 and an Indian unloading the goods from a mail van into this house about 6.00 a.m. that morning. He identified both men with the aid of his torch. He gave his evidence very clearly and I am quite satisfied that he was sure of the identity of both men and that the goods found by Mr. Haynes in the house at 8.45 a.m. were those which No. 2 had helped to unload from the mail van about 6.00 a.m."

The fact that the appellant "helped to unload" the packages that contained the uncustomed goods from the mail van is not in itself sufficient to establish possession of the packages, still less their contents, in the appellant.

Sitting as an appellate Court I am entitled to make up my own mind on the facts so far as they are known, with full liberty to draw my own inferences from the facts proved or admitted and to decide accordingly. If authority is needed for this proposition it is to be found in the case of *Mersey Docks and Harbour Board v. Procter*[2].

The following facts, as to which there appeared to be no dispute, were proved by the prosecution and appear clearly in the record of the evidence. The appellant and Marhom bin Oderi were at all material times employed as motor van drivers by Hock Cheong Transport Co. Ltd. of Malacca. This transport Company operated daily a newspaper collection and delivery service between Singapore and the Federation, and they owned a number of motor vans in which they were permitted to carry only films, newspapers and magazines. The Company expressly instructed their van drivers on this service, including the appellant and Marhom bin Oderi, not to carry any goods other than films, newspapers and magazines in the Company's vans on pain of instant dismissal if they were discovered so doing. It was the practice of the Company to employ two drivers in each van on this service. On the 27th April, 1953 the appellant was relief driver to Marhom bin Oderi in one of the Company's vans on this collection and delivery service, and they arrived in Singapore about 5 p.m. on that day. Having delivered films to various agencies in Singapore they reported to the Company's office in Singapore. On instructions they then drove the Company's van to the office of the Straits Times Publishing Co. in order to collect the newspapers for the following day for delivery to various places in the Federation as far North as Seremban. About 11.30 p.m. the van was loaded with a cargo of newspapers, and the appellant and Marhom bin Oderi then commenced their return trip to the Federation, Marhom bin Oderi driving. They reached Johore Bahru about 12.30 a.m. and stopped at the Customs checking point. Here the Customs officer on duty carried out an examination of the van, and it was eventually cleared. Marhom bin Oderi then proceeded to drive the van off the accustomed route back to Malacca, and the appellant was prompted to ask him whither he was driving. Marhom bin Oderi then informed him that he was driving to the Capitol Theatre where someone wanted to dispatch some goods. The van was stopped at the Capitol Theatre. There a Chinese handed three packages to the driver, saying : "These are the goods." They were loaded into the van on top of the newspapers. The appellant and his co-driver then proceeded on their way North, stopping at Scudai, Senai, Kulai and Muar to deliver newspapers. On arrival at Malacca, about 6 a.m., the van was driven to No. 123, Kampong Bukit China, in a room in which the second wife of Marhom bin Oderi lived, and it was parked outside while the three packages were unloaded and taken into this house. The appellant

assisted Marhom bin Oderi to do so. While they were unloading the van in front of No. 123, Kampong Bukit China, Special Constable Othman bin Rasip No. 10972, who was returning from rounds, passed by and he observed what was taking place. About 8.45 a.m. on the same day Mr. Haymes, an Assistant Customs Officer at Malacca, together with a party of Revenue Officers, raided No. 123, Kampong Bukit China, and in a room in that house they found three packages. Neither the appellant nor Marhom bin Oderi were present in the house at the time of the raid. Marhom bin Oderi, whose second wife was present in the room in which the packages were found, was then sent for, and after his arrival the three packages were opened in his presence. They were found to contain the goods set forth in the charge, and in respect of which Customs duty in the sum of $1,027.64 was payable on importation into the Federation of Malaya. These goods were then seized by the Customs raiding party, and Marhom bin Oderi was arrested. Later that morning, after having been cautioned, Marhom bin Oderi made a statement which was recorded by Mr. Haymes. On 2nd May, 1953 the appellant was arrested and charged. On the same day, after having been cautioned, he also made a statement which was recorded by Mr. Haymes. On the 27th May, 1953 a further statement from Marhom bin Oderi was recorded by Mr. Haymes. These statements were proved by the prosecution and put in evidence.

According to the statement made by Marhom bin Oderi regarding the three packages he, Marhom bin Oderi, was first approached by a friend of his while he was in the office of the Straits Times Publishing Co. to take some parcels of goods to Malacca. He was told that there were some playing cards in the parcels, and as he knew that there would be Customs duty payable on them at Johore Bahru he at first refused to take the parcel. He was then told that these parcels were already in Johore Bahru, and that all he was required to do was to pick them up at the Capitol Theatre there and to take them to his house in Malacca where a friend would later take delivery of them. There was no evidence that the appellant was present during this conversation or was later informed of it by Marhom bin Oderi.

According to the statement of the appellant on this point he stated that he was unaware of the contents of the parcels.

The sum total of the evidence for the prosecution against the appellant, therefore, was that he was the relief driver in a van in which were transported from Johore Bahru to Malacca three packages containing certain goods, that he did not know, and had no opportunity of getting to know, that the goods contained in these three packages were uncustomed goods, and that upon arrival in Malacca he assisted in unloading these three packages and taking them into the house occupied by the second wife of the other driver of the van.

The question, therefore, resolves itself into this, is that evidence sufficient to estabish "possession" of the uncustomed goods found in the three packages in the appellant? That they were in the possession of Marhom bin Oderi there can be no doubt, but was that possession exclusive to Marhom bin Oderi or was the appellant in joint possession thereof with him? I am clearly of opinion that on the evidence adduced by the prosecution the goods were not in the joint possession of the appellant and Mahom bin Oderi. It has frequently been held in this Court that mere juxtaposition is not enough to constitute possession. There must be something more. In *Toh Ah Loh and Mak Thim v. Rex*[3] Gordon Smith, Ag. C.J., delivering the judgment of the Court of Appeal, observed :—

> "Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing and lastly must be conscious of his possession of the thing."

The factors were clearly absent here. It follows that in my view there was no evidence before the learned President which would justify his amending the charge to one under section 114(c) (e) of the Customs Enactment, 1936.

For these reasons the appeal is allowed and the conviction and sentence must be set aside. The fine, if paid must be refunded to the appellant.

Appeal allowed.

Solicitor for the appellant: *C. S. Jayaswal.*

J. M. GOMES & CO. v. SAURAJEN VISVA NATHAN.

[A. C. J. (Bellamy, J.) October 12, 1953]

[Malacca — Civil Appeal No. 3 of 1953]

Practice and Procedure — Subordinate Courts Rules, 1950, O. 10, r. 3 — Failure to file defence within time — Solicitor's omission to file defence in time or obtain consent or an Order of the Court for an extension of time — Discretion of Court.

In this case on the return date of the summons the defendants (appellants) had not filed a defence, nor had they or their solicitor taken any step to obtain either the consent of the plaintiff's solicitors or an order of the Court for an extension of the time fixed by the Subordinate Courts Rules for filing their defence to, the claim. The case was tried by the learned President who, upon the application of the plaintiff's solicitors and after hearing the defendants and their solicitor on the matter, made an order that the defendants being in default of filing their defence as required by the Rules be precluded